MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

CAN A MANUFACTURER BE COMPELLED TO SELL?—The fight for price maintenance is not yet completely settled, despite the decisions in *Dr. Miles Medical Company* v. *Parks & Sons Company*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, and *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 58 L. Ed. 1041, which held invalid contracts, whether nominally of agency, or of sale, between manufacturer and wholesaler or jobber whereby the latter in purchasing agreed himself to maintain and to sell only to others who would maintain a schedule of prices established by the manufacturer. But there are more ways than one of maintaining prices. One of these is to refuse to sell to persons who do not in fact maintain the established and "recommended" schedule. Can the legislature or can the courts compel a manufacturer to sell to any person who offers the price? The first of these questions is suggested and the second raised for decision in the case of the *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, decided November 10, 1915, by the United States Circuit Court of Appeals for the 2nd Circuit.

The precise question in that case was "Did Sec. 2 of the CLAYTON ACT (Act Oct. 15, 1914, c. 323, § 2, 38 Stat. 730) make the defendant's published

scheme of sales, which involved a schedule of prices, a recommendation and request to wholesalers to resell only at specified retail prices, and a declaration that the defendant manufacturer would sell only to wholesalers illegal as creating an actual monopoly of and lessening competition in Cream of Wheat?"* On the theory that defendant's practices were thus made illegal the plaintiff asked that defendant be enjoined and prohibited from enforcing and carrying out its system of sales * * * and from thereby in any manner cutting off the plaintiff's supply of Cream of Wheat.

The District Court denied the injunction in an opinion filed July 20, 1915, in 224 Fed. 566. This decision the Circuit Court of Appeals has now affirmed in a brief opinion written by Judge LACOMBE, which so far as expressed accepts the views declared by Judge HOUGH of the District Court. Both opinions dwell upon the fact that Cream of Wheat is little more than a name applied under authority of the Trademark Laws to what are known as "middlings". Middlings are a grade of wheat which the defendant buys, cleans and puts up without subjecting to any other process, in packages with the name indicated. Defendant buys less than 1% of the middlings crop of the country and there is nothing to prevent as many others as may desire from buying and selling as much as they please. Hence there is nothing approaching a monopoly about the business except in the use of the name, and for this of course the defendant has authority under the laws of the United States. The Circuit Court of Appeals concludes its opinion with the following statement: "Before the SHERMAN ACT it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had had some personal difference with him, political, racial or social. That was purely his own affair, with which nobody else had any concern. Neither the SHERMAN ACT nor any decision of the Supreme Court construing the same, nor the CLAYTON ACT, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

The plaintiff, it should be remarked, is a corporation owning a chain of stores to the number of more than 1000 extending across the country, selling merchandise with a minimum of service and overhead charge at prices lower than the ordinary grocery store could compete with and live. The company is not a "wholesaler" but despite that fact had been supplied by the defendant company with Cream of Wheat at the established prices until because of its persistent cutting of retail prices the continuance of the supply was cut off by defendant.

The effect of the decision is that § 2 of the CLAYTON ACT, which makes it unlawful for any person engaged in commerce to discriminate in price between different purchasers where the effect of such discrimination may

* The fact that the Tea Company was a retailer and that the Wheat Company had chosen to treat it as an exception to its own published plan of sales was disregarded.

be to substantially lessen competition or tend to create a monopoly, with the proviso that nothing in said Act contained shall prevent persons engaged in selling from selecting their own customers in bona fide transactions and not in restraint of trade, does not compel manufacturers to sell contrary to their will their products, the only monopolistic feature of which is a registered trade-mark and name. The decision seems sound. Defendant had a monopoly in Cream of Wheat, to be sure, but that was in reality a monopoly only in the use of that name. It had no monopoly and was not attempting to acquire one, or even to diminish or restrain trade in purified middlings, and Cream of Wheat is nothing in the world but purified middlings. A contrary decision certainly would have prevented defendant from "selecting its own customers."

An interesting suggestion regarding the situation developed in this case is made in 29 HARVARD LAW REVIEW, 77. The writer relies upon the common law principle that intentional damage without justification is actionable.

On similar grounds it is claimed injury by a manufacturer against a retailer by means of a discrimination whose purpose is illegal restraint of trade should be actionable. It is then suggested that the CLAYTON ACT which now makes it illegal "to discriminate in price" (§ 2) and therefore does not cover discrimination by refusal to sell at any price, be so amended as to prohibit discrimination of any kind among customers for the purpose of restraining trade.

Such statutory provisions doubtless would accomplish the purpose indicated. Would the statute then be constitutional? Perhaps the presumptions which attach in favor of legislation and the reserve which our better courts properly have been exercising during the last few years in considering at all the *policy* of legislation would result in the sustaining of such a law. The policy of such a law certainly is open to serious question. The just criticism of many American courts for setting aside legislation, in a juristic period already ending, has resulted apparently in a mad impulse to justify any kind of legislation *supposedly* in the social interest if only it imposes some kind of prohibition, limitation or restraint upon a corporation or other successful enterprise. But why, in what Justice HOLMES in his dissenting opinion in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 411, 31 Sup. Ct. 376, 386, 55 L. Ed. 502, 520, characterizes as "even the present enthusiasm for regulating prices to be charged by other people," should the Wheat Company be obliged to sell its product to the Tea Company? What social good would result? The Tea Company would be enabled without sufficient consideration to utilize the trade name, the good will, the reputation for high grade and honest goods which the Wheat Company has built up by the exercise of high business ability, honesty, energy, and the expenditure of large sums of money in advertising. How would the Tea Company use this control over the name and good will of the Wheat Company, for certainly it would have such control under the proposed statute? By selling Cream of Wheat to its customers at a reduced price of course for the purpose of attracting buyers to its store, many of them led there by the false belief that because

Cream of Wheat, with its established quality and price, is sold below cost other articles and commodities will be also. The Tea Company profits, those of its customers who buy Cream of Wheat profit temporarily and to some extent, but probably a large number of them purchase other goods under the mistaken impression created as indicated that they are buying them too below cost. Is this a net social good? It is difficult to see it. There is nothing to prevent the Tea Company from selling purified wheat middlings at any price it may see fit or from putting them up in attractive packages with an attractive name. The final result not improbably would be to make it impossible for ordinary retailers to carry these goods (and if these, ultimately almost any established and well known products), thus perhaps demoralizing retail trade, crippling manufactures with ultimate approach to, instead of prevention of monopoly. That might conceivably be a desirable result, but it certainly is not within the purview of a statute to prevent monopoly and restraint of trade. The case would be otherwise concerning commodities for which there is no acceptable equivalent, converted into monopoly by patent or other laws. H. M. B.

THE RULE AGAINST PERPETUITIES AS APPLIED TO OPTIONS.—Does the rule against perpetuities render unlimited options void? This is a question which the English courts answered affirmatively some thirty-five years ago; new aspects of the question have been frequently presented to those courts since that time, and conclusions not easy to reconcile have been reached. It is believed that the present status of the law in England is that an option is like any other interest in land, void if it may arise at too remote a time, otherwise not. This conclusion is based on the decision in *Borland's Trustees* v. *Steel Bros. & Co.* [1901] 1 Ch. D. 279, sustaining an option of a corporation to buy or call in its stock at any time; and *Southeastern Ry. Co.* v. *Associated Portland Cement Mfgrs.* [1910] 1 Ch. D. 12, sustaining a reservation of the right to tunnel under a railway at any time, reserved in the grant of the right of way. The American courts are just getting into the muddle, and it remains for the future to tell what will come of it, and, if the doctrine is accepted, how our courts can reconcile it with our kindred decisions since the first settlement. The most extreme view yet advanced is in a recent West Virginia case. Defendants sold two parcels of land, reserving to themselves and their heirs the right at any time to purchase the minerals under one piece at $1 an acre, and to purchase the minerals under the other at the same price at any time within 99 years. Plaintiffs, claiming title under these deeds, sued to have the options declared void and the cloud removed from the title. A decree for defendants was reversed on appeal, and decree according to the prayer ordered. *Woodall* v. *Bruen* (W. Va. 1915), 85 S. E. 170.

This decision is an extension of the doctrine of *Starcher* v. *Duty*, 61 W. Va. 373, 56 S. E. 527, 9 L. R. A. N. S. 913, 123 Am. St. Rep. 990, in which the court held a *grant* of a similar option void. The whole doctrine is based on the decision of the English Court of Appeal in *London S. W.*